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HAROLD B. WILLEY, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 772

BRUTUS LEWIS,
Petitioner, and
Defendant-Appellant below,

vs.

UNITED STATES OF AMERICA,
Respondent, and
Plaintiff-Appellee below.

PETITION FOR WRIT OF CERTIORARI.

CAPELLE DAMRELL,
777—First National Bank Bldg.,
Chicago, Illinois,
Attorney for Petitioner.

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To The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Brutus Lewis, defendant-appellant below, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on March 16, 1955, and the order denying a petition for rehearing, entered by said court on April 6, 1955.

OPINION BELOW.

The opinion of the Court of Appeals for the Seventh Circuit, dated March 16, 1955, is herewith reproduced.

In The

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 11289 October Term, 1954, January Session, 1955

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
BRUTUS LEWIS,
Defendant-Appellant.

} Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

March 16, 1955.

Before MAJOR, FINNEGAN and LINDLEY, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* Defendant, Lewis, was convicted below, after waiving a jury, for violating 21 U.S.C. § 174(a) and 26 U. S. C. § 2554(a). He contends that the government's evidence failed to establish his guilt beyond a reasonable doubt. We disagree. *United States* v. *Aman,* 210 F. 2d 344, 349 (7th Cir. 1954), *United States* v. *Holmes,* 187 F. 2d 222 (7th Cir. 1951). It would neither aid defendant, nor do more than accumulate precedent on well-settled principles, to detail all the facts we encountered canvassing this record. We are satisfied reversible errors are absent and fundamental rights unimpaired.

The judgment of the District Court is affirmed.

Affirmed.

A true Copy:

Teste:

.....

Clerk of the U. S. Court of Appeals for the 7th Circ.

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JURISDICTION.

Jurisdiction of this Court is invoked under Title 28, United States Code, Sections 1252-1257.

QUESTIONS PRESENTED.

1. Was the evidence sufficient to establish the guilt of the defendant-appellant, beyond a reasonable doubt, as a matter of law?

2. Should the defense of entrapment be allowed?

STATUTES INVOLVED.

Title 26, U.S.C., Sections 2553 (a) and 2554 (a).
Title 21, U.S.C., Section 174.

STATEMENT.

The defendant, Brutus Lewis, was convicted on May 20, 1954 by the District Court, after a trial without a jury of Counts II and III of an indictment charging him with (1) the sale, and (2) the receiving, buying and transportation of 27 grains of heroin. The court imposed upon the defendant a sentence of three years in the custody of the Attorney General of the United States and a fine of One Thousand Dollars. (Tr. 99-100). The indictment, filed July 31, 1953, consisted of three counts which may be summarized as follows:

Count I was dismissed.

Count II charged that on December 13, 1952, at Chicago, Illinois, the defendant sold to Charles Montgomery for $17.50 twenty-seven grains of heroin not in pursuance of a written order of Charles Montgomery on a form issued

in blank for that purpose by the Secretary of the Treasury of the United States; in violation of Sec. 2554 (A) Title 26, United States Code.

Count III charged that on December 13, 1952, the defendant fraudulently and knowingly received, concealed, bought and facilitated the transportation and concealment of 27 grains of heroin knowing the same to be imported into the United States contrary to law; in violation of Sec. 174, Title 21, United States Code.

The lower Court, on appeal to the Circuit Court of Appeals, 7th Circuit, was affirmed on March 16, 1955. A motion for rehearing was filed and denied April 6, 1955.

REASONS RELIED ON FOR ALLOWING WRIT.

There was no evidence to support a Finding of Guilty in Count III. Nor was there evidence of scienter, nor receipt, concealment and buying of heroin as required by wording of statute.

Although the Court upheld the conviction on both Counts II and III, nevertheless, there was no evidence whatsoever to substantiate a guilty finding as to Count III, which charged *inter alia*, that "defendant did then and there fraudulently and knowingly received, conceal, buy and facilitate the transportation and concealment after importation of a quantity of a certain derivative of opium, to wit, 27 grains of heroin, knowing the same to be imported into the United States contrary to law."

The lower Court sentenced the defendant, after a finding of guilty on both Counts. It is fair to infer that if there had been a finding of guilty on the second Count only, the sentence presumably could have been less than the three (3) years, meted out. It is for this reason, therefore, that

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a request is made for a definite ruling on the sufficiency of evidence in Count III.

2. Entrapment is a complete defense.

Under the authority of *Sorrett* v. *U. S.*, 287 U.S. 453; 53 S. Ct. 210, the Court did not but should have made a definite finding that no entrapment existed. There was no evidence of previous sales by the defendant and there was no showing of a reasonable suspicion on the part of the enforcement personnel that the defendant was engaged in the commission of a crime, or was about to do so. See also *Morei* v. *U. S.*, 127 F. 2d, 827.

See also, *Heath* v. *U. S.*, 169 F. 2d, 1007; *Mitchell* v. *U. S.*, 143 F. 2d, 953, which is authority for the position that the government must prove reasonable grounds exist of unlawful activity before they may entrap a person into the commission of a crime.

3. There was insufficient evidence to sustain finding of "Guilty". The quantum of evidence, adduced by plaintiff, was insufficient to meet the requirements of preponderance of evidence in a civil case, let alone "beyond a reasonable doubt", which is required in a criminal case.

See *U. S.* v. *Wainer*, 170 F. 2d, 603 [7th Circ.], where this Court reversed a finding of "guilty", by the Court saying:

> "We *cannot agree that the defendant should go to prison on suspicion, even though*, it were a robust suspicion which this is not."

See *U. S.* v. *Kovich*, 201 F. 2d, 470 [7th Circ.], which was a civil case where the court held there was insufficient evidence to sustain an order directing the return of personal property.

See also *U. S.* v. *Litberg,* 175 F. 2d, 20 (7th Cir.), where the evidence was as consistent with innocence as with guilt. The Court in reversing went on to say that the lower Court *may draw inferences,* but reviewing Court is charged with responsibility of determining reasonableness of such inferences.

4. Testimony of Steve Lewis, a government witness and a thrice convicted felon, with multiple inconsistencies should have been discredited and rejected as inherently irresponsible. The doctrine of *falsus in uno, falsus in omnibus,* is applicable here. There were glaring inconsistencies in the testimony of the two government witnesses.

a. Agent Montgomery claimed he asked for a "horse" (P. 21);

b. Agent Lewis claimed he asked for a horse (P. 35).

Further that there was no sale of the article within the meaning of the Act and under the law applicable here.

5. This Court erroneously disregarded testimony of defendant's witnesses, Geraldine and Alexine Dunsmore, who testified that no such transaction was made as the government's witnesses contended. Their testimony was unimpeached and should have received full credence.

CONCLUSION.

For the foregoing reasons it is respectfully urged that these facts warrant a confession of error by the government and that a Writ of Certiorari be granted.

CAPELLE DAMRELL,
Attorney for Petitioner.

Room 777, First National Bank Building
c/o O'Hara & Greenhouse
38 South Dearborn Street
Chicago 3, Illinois